

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SABRA v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1716

MIGRATION – MRT decision – permanent spouse visa – whether living together – finding directed at past period and not at date of decision – other findings about spouse relationship possibly affected – jurisdictional error found – matter remitted.

Migration Regulations 1994 (Cth), regs.1.15A, 1.15A(1A)(b), 1.15A(1A)(b)(i), 1.15A(1A)(b)(ii), 1.15A(1A)(b)(iii), 1.15A(3), 1.15A(5), Sch.2 item 100.221(2)(b)

Ally v Minister for Immigration & Citizenship [2007] FCA 1373

Ally v Minister for Immigration & Anor [2007] FMCA 430

Craig v South Australia (1995) 184 CLR 163

Herft v Minister for Immigration & Anor [2007] FMCA 756

Ho v Minister for Immigration & Anor [2006] FMCA 1285

Latt v Minister for Immigration & Anor [2007] FMCA 766

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323

Nouv v Minister for Immigration & Multicultural Affairs [2006] FCA 1474

SZBYR v Minister for Immigration & Citizenship [2007] HCA 26

Applicant:	HAMDA MAHMOUD SABRA
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG1052 of 2007
Judgment of:	Smith FM
Hearing date:	5 October 2007
Delivered at:	Sydney

Delivered on: 24 October 2007

REPRESENTATION

Counsel for the Applicant: Mr M Jones

Solicitors for the Applicant: Michael Jones, Solicitor

Counsel for the First Respondent: Mr G Kennett

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

- (1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 2 March 2007 in matter N05/04313.
- (2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 11 July 2005.
- (3) The first respondent pay the applicant's costs in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG1052 of 2007

HAMDA MAHMOUD SABRA
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. Mrs Sabra married her cousin, an Australian citizen, in Lebanon in 2000, and in January 2002 she applied for visas allowing her to enter Australia and to reside permanently. On 7 June 2002, a delegate of the Minister granted her a temporary residence, class UF, subclass 309 visa. This allowed her to join her husband in Australia, and to remain until her entitlement to a permanent subclass 100 visa was determined. On 2 March 2007 the Migration Review Tribunal decided that she did not qualify for that visa, and affirmed a delegate's decision to refuse it.
2. I am now asked to set aside the Tribunal's decision, and to order it to reconsider her entitlement to the permanent visa. I can only give this remedy, if I am satisfied that its decision is affected by jurisdictional error. I cannot myself decide whether she is qualified for the visa.

3. Under the Migration Regulations' scheme for spouse visas, it was required that 2 years should pass after the visa application, before a permanent visa could be granted. It was also required that the applicant should satisfy a decision-maker that she was the "spouse" of her husband at three points in time: at the date of her visa applications in 2002, at the date of the 2002 decision to grant the subclass 309 visa, and at the date of the decision on the subclass 100 visa. Whether she was his "spouse" at the first two dates, was required to be addressed by the decision-maker before granting the 309 visa. A decision-maker considering the subsequent grant of a 100 visa, was not required to consider these issues again, but was required by item 100.221(2)(b) of Sch.2 to the *Migration Regulations 1994* (Cth) to be satisfied that she "*is the spouse of the sponsoring spouse*" as at the date of making that decision.
4. The present Tribunal made its decision on 2 March 2007. It found that the applicant did not meet that criterion, because she did not meet the prescribed conditions of being a "spouse". It is now argued that the Tribunal failed to address at least one of its significant ultimate findings at the correct point of time. Rather, than addressing only whether the applicant and her husband "*live together*" at the date of its decision, its findings on that condition erroneously addressed their situation over an uncertain preceding period, and not as at the relevant date. It is argued that, by doing this, it "*ask[ed] itself a wrong question*", and made a jurisdictional error for which relief by way of writs of certiorari and mandamus should be granted (see *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82], quoting *Craig v South Australia* (1995) 184 CLR 163 at 179). As I shall explain, I have accepted this argument.
5. The applicant also argued that the Tribunal failed to consider the evidentiary significance of findings as to the prior existence of a "spouse" relationship, made by the delegate when granting the 309 visa. It is argued that it was bound by law to have regard to these findings. I have not found it necessary to address this argument. I do, however, note that it appears contrary to authority (see *Ho v Minister for Immigration & Anor* [2006] FMCA 1285 at [30], *Nouv v Minister for Immigration & Multicultural Affairs* [2006] FCA 1474 at [14], *Latt v Minister for Immigration & Anor* [2007] FMCA 766 at [32], and

Herft v Minister for Immigration & Anor [2007] FMCA 756 at [11]). I also note that, in the particular circumstances of this case, it may be difficult to conclude that the findings of the delegate as to the spousal relationship existing at two dates in 2002 were overlooked by the Tribunal, before it made findings addressing their relationship at a later time.

6. A finding whether the applicant was the “spouse” of her husband at any point of time, required more than the existence of that legal relationship at the relevant date. The definition of “spouse” in reg.1.15A(1A)(b) required the Minister to be satisfied that three additional matters existed cumulatively at that date:

- (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- (ii) *the relationship between them is genuine and continuing; and*
- (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

7. Reg.1.15A(3) required the Minister, when “forming an opinion” whether these conditions were satisfied, to “have regard to all of the circumstances of the relationship”, including a list of specified matters concerning the financial aspects of the relationship, the nature of their household, the social aspects of the relationship, and the “nature of the persons’ commitment to each other”.

8. Reg.1.15A(5) provided:

If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

9. It is readily apparent that applying the reg.1.15A(1A) definitional conditions of being a “spouse” at a legally relevant date may involve the evaluation of evidence concerning events and relationships at other periods or points of time, to the extent that this evidence can rationally

inform a finding as at the relevant date. Earlier events might carry inferences of a later continuing state of affairs. Later events might allow the use of hindsight to confirm or clarify an earlier uncertainty. Also, the evidence of witnesses as to a spousal relationship at a different date or period might reflect on the credibility of their evidence as to their situation at the legally critical date.

10. Moreover, some of the concepts required to be considered in the three conditions under reg.1.15A(1A)(b), themselves invite a temporal assessment going beyond the precisely relevant date. The concepts of “*mutual commitment*”, and a “*continuing*” relationship require an evaluation of matters which are not instantaneous in their development, and which involve projections into the future. Also, the evidentiary benefit of reg.1.15A(5) expressly flows from findings about “living together” over a prior period.
11. The above points suggest that the mere presence in a Tribunal’s reasoning of an examination of evidence concerning the presence or absence of a spousal relationship or cohabitation at dates or periods other than the critical date, may not establish that the Tribunal failed to address its decisive findings at the legally relevant date. If there is some obscurity whether the Tribunal did direct its findings on the reg.1.15A(1A)(b) conditions only at the relevant date, then it should be given the benefit of doubts (as I did in *Herft* (supra) at [49]-[51], bearing in mind *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 277 and 291).
12. However, the personal relationship and cohabitation of spouses may not be unchanging, and evidence bearing on these matters from time to time might be open to highly variable evaluations. The item 100.221(2) (b) criterion for a subclass 100 spouse visas is, as I have indicated, clearly drawn so as not to require findings that the conditions of being a “spouse” have continued throughout any periods of time, but requires the satisfaction of the conditions to be precisely directed only at one defined date. In this situation, it can be materially distracting from the essence of the Regulations, as well as legally irrelevant, if a Tribunal fails to address its consideration of the evidence, and its findings in relation to each of the reg.1.15A(1A)(b) conditions, at only the legally critical date.

13. In *Ally v Minister for Immigration & Anor* [2007] FMCA 430 at [34]-[36], I accepted that a Tribunal which was required to address the conditions in reg.1.15A(1A)(b) at an earlier date of visa application, could make use of an assessment of later events over several years. However, I emphasised:

36. ... *What was important, however, was that the Tribunal should only address evidence of later events to consider whether they confirmed the existence or otherwise at 27 July 2000 of a marriage in which the parties had “mutual commitment to a shared life as husband and wife” and a relationship which at that time was “genuine and continuing”. The Tribunal would have erred if, when addressing item 820.211(2)(a) in the light of subsequent events, it addressed the wrong question, such as whether subsequent events showed that the marriage over its whole period or at a later date lacked the elements required by reg.1.15A.*

14. This passage was approved by Spender J in *Ally v Minister for Immigration & Citizenship* [2007] FCA 1373 at [29], although his Honour gave leave for an appeal from my failure to be satisfied that such an error was shown in the Tribunal’s reasoning in that case.
15. In the present case, the Tribunal expressed its ultimate findings in relation to the three conditions in reg.1.15A(1A)(b) in one paragraph:

63. *Giving the above findings which have looked at the financial aspects, the household, and the social aspects, the Tribunal is not satisfied that the parties have a commitment to each other as husband and wife. Given these findings in relation to regulation 1.15A, the Tribunal is not satisfied that at the time of decision, the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others and the relationship is genuine and continuing and they have been living together or not been living separately and apart on a permanent basis.*

16. Allowing the Tribunal latitude in its expression of its findings on the three conditions, I accept that this paragraph might be understood to make findings directed at the date of its decision in relation to the matters of “mutual commitment” and “genuine and continuing relationship”, in accordance with conditions 1.15A(1A)(b)(i) and (ii).

17. However, the Tribunal's finding in relation to condition (iii) is, in my opinion, expressed in terms directed at an unclearly specified past period of time, and not at the date of the Tribunal's decision. The condition required the Tribunal to be satisfied that the parties "*live together*" or that any separation was not "*on a permanent basis*" as at the date of its decision, and at no other earlier date or period. However, the Tribunal found only a failure to be satisfied, in the past tense, that "*they have been living together*". Its language appears to have required proof of a state of "living together" or of non-permanent separation over a period of time preceding the date of its decision. The language of the Tribunal's ultimate finding in relation to this condition, therefore, in my opinion, is suggestive of legal error.
18. To confirm or clarify whether the Tribunal made this error, it is necessary to examine the reasoning process explained by the Tribunal which preceded its ultimate conclusions. Not without hesitation, I have concluded that the Tribunal did become confused as to the legally relevant time to address its ultimate findings, in particular in relation to condition (iii), but also possibly influencing its assessment of conditions (i) and (ii).
19. Nowhere in its statement of reasons did the Tribunal extract the terms of the conditions in reg.1.15A(1A)(b), nor provide an unambiguous paraphrase which recognised the temporal precision required when addressing those conditions in their application to criterion 100.221(2) (b). Rather, it instructed itself in loose language which suggests error, rather than the converse.
20. In its brief narration of "*Legislation and Policy*", it said:
9. *The criteria for a subclass 100 visa, relevant to this review, are set out in subclause 100.221. There is no time of application criteria to be satisfied by virtue of the requirement the visa applicant has already been assessed for and granted a subclass 309 visa. The relevant subclause requires that the visa applicant continue to be the spouse of the sponsor and that the visa applicant continues to be sponsored by the sponsoring spouse and that the parties to the spousal relationship have not changed.*

21. The Tribunal then narrated the reasoning of the delegate, the evidence taken at the hearing, and the written submissions presented in response to invitations for comments. These had all focused upon whether Mrs Sabra and her husband had given inconsistent evidence in an interview conducted by the delegate, concerning a change of their place of residence occurring in 2005. They had also explored Mrs Sabra's knowledge of her husband's work during the years 2003 to 2006, and whether she had been living at a different address with her husband's sister at times during 2005.

22. The Tribunal repeated its earlier paraphrase of the critical criterion at the start of its "*Findings*":

48. *The criteria for a subclass 100 visa, relevant to this review, are set out in subclause 100.221. There is no time of application criteria to be satisfied by virtue of the requirement the visa applicant has already been assessed for and granted a subclass 309 visa. It is required that the visa applicant continue to be the spouse of the nominator and that the visa applicant continues to be sponsored by the sponsoring spouse and that the parties to the spousal relationship have not changed.*

23. This tends to confirm, rather than otherwise, that the Tribunal might have been confused whether it should look for a past "continuing" satisfaction of the conditions defining a "spouse" and a sponsorship.

24. Its next paragraph, [49], does not dispel this concern. In this, the Tribunal instructed itself that it was required to address the conditions and considerations set out in reg.1.15A "*in forming an opinion whether a married relationship ... exists*", without showing awareness that it was only concerned with such an existence as at the date of its decision. The opening sentence to this paragraph suggests that it might have thought that the situation at the application date, or a continuing situation, was required to be addressed. I am left with this concern, notwithstanding that neither counsel nor I was able to make sense of that sentence:

Accordingly, the Tribunal must at the time of its decision decide whether the applicant is the sponsor of the sponsoring spouse relationship between the parties was, at the time of the application, one of 'spouses' as contemplated by the legislation.

25. The Tribunal then addressed the evidence of where Mrs Sabra and her husband and his family were living during 2005, and what she knew of her husband's employment in 2003 to 2005. It said: "*the Tribunal proceeded at the hearing to investigate, amongst other issues, whether the parties lived together*". This introduced two pages of evidentiary discussion on these matters, which clearly show a focusing of its investigation at a period of time prior to the hearing and its decision.
26. I accept that the Tribunal explained this investigation as one which assisted its conclusions "*on whether the Tribunal finds the parties to be credible*". It found inconsistencies in their evidence, and a lack of knowledge, in relation to matters "*that the parties would know if they were in a genuine relationship*". This culminated in a finding at [61] "*that given the above inconsistencies, it is not satisfied that the parties have lived together at 2 Chiltern Road or that they have lived together for the periods claimed*".
27. This finding essentially addressed events during 2005, and did not address Mrs Sabra's current residential address nor whether her husband was currently living with her. Indeed, nowhere did the Tribunal focus upon the 2007 living arrangements or lives of Mrs Sabra and her husband. Rather, in paragraph [61] it moved directly from an adverse view of where they had lived in the past, to adopt conclusions expressed in the present tense in relation to the first two conditions in reg.1.15A(1A)(b). It said that it "*concludes that the relationship is not genuine and continuing*". This reasoning tends to raise a concern whether, in fact, the Tribunal arrived at that conclusion merely by extrapolation from a factual finding about a past situation, without properly addressing the more current evidence in relation to "*genuine and continuing*" relationship as at the date of its decision. Its reasoning about the first two conditions does not dispel my concern that the Tribunal did not properly focus all its factual conclusions at the required point of time.
28. In paragraph [62], which immediately preceded its ultimate findings on the reg.1.15A(1A)(b) conditions, the Tribunal returned to the controversy about where Mrs Sabra and her husband and family had lived during 2005. It expressly rejected explanations for some inconsistent evidence about this, and concluded: "*accordingly, given*

the inconsistencies at the Departmental interview and at hearing, the Tribunal is not satisfied that the parties have been living as claimed at Rosebery Road". Although this refers to the address to which Mrs Sabra and her husband claimed to have moved in 2005, in its terms it appears to require Mrs Sabra to have established the condition of "*live together*" over a past period of time, rather than at the legally relevant point in time.

29. On the above analysis of the Tribunal's reasoning preceding its ultimate finding in [63] on the "spouse" condition in reg.1.15A(1A)(b)(iii), I find confirmation, rather than the opposite, that the Tribunal did err when addressing this condition. I therefore find that the Tribunal erroneously required proof of a state of "living together", or of non-permanent separation, over a period of time preceding the date of its decision. It did not address its consideration of this condition at the legally relevant point of time, which was the date of its own decision. It therefore made a jurisdictional error, in its application of the relevant law to a review of the delegate's decision.
30. My above analysis of the Tribunal's over-all reasoning also leaves me unpersuaded by the Minister's argument that any error in the Tribunal's application of reg.1.15A(1A)(b)(iii) was immaterial or should not lead to the grant of relief. He argued that the Tribunal's conclusions on the other two conditions, which were essential conditions, was properly expressed in the present tense, and that therefore its decision could be supported on those conclusions alone.
31. However, the Tribunal's essential reasoning for its conclusions on all three conditions in reg.1.15A(1A)(b) was built upon, and confined to, its failure to be satisfied as to a claimed place of cohabitation over a period of years, and in 2005, in particular. As I have found, it incorrectly treated this finding as a complete answer to condition (iii). I cannot be satisfied that it may not also have treated the other two conditions as requiring a favourable conclusion as to a period of time, and not just the date of its own decision. I am not persuaded that the Tribunal's reasoning leading to its findings in relation to conditions (i) and (ii) were unaffected by its error.
32. Considering the evidence before the Tribunal broadly, it was not contended by the Minister, nor would I find, that if the matter were

remitted there is no prospect that Mrs Sabra would be able to satisfy another Tribunal, properly instructed in law, in relation to all conditions raised by reg.1.15A. I am not satisfied in this case that a discretionary reason for refusing relief has been established (see *SZBYR v Minister for Immigration & Citizenship* [2007] HCA 26 at [18]-[29], [53]- [59], [76]-[77], [88]-[89]). I consider that the issue of writs of certiorari and mandamus would be in the interests of the administration of justice in this case.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 24 October 2007